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IN THE

Supreme Court of the United States

October Term, 1940

No. 644.

THE H. W. GOSSARD COMPANY,
Petitioner,

vs.

LOEBER'S, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL E. DARBY, JR.,
FLOYD H. CREWS,
Counsel for Respondent.

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I.

This is an ordinary patent case, the sole issue being validity. No public interest is involved, nor is any novel question of law presented.

The suit involves two patents to the same patentee, the second of which is for a most trivial and unpatentable modification of the first. This suit is the only one in which the second patent has been involved. The first patent has previously been held to be invalid by the Court of Appeals for the Sixth Circuit in *Loeber Hair Goods Company* v. *H. W. Gossard Company,* 87 Fed. (2d) 98—a fact which the petition nowhere mentions. In consequence, there is no conflict of opinion of Circuit Courts of Appeals.

Under these circumstances, according to previous decisions of this Court, this case is not one in which a writ of certiorari will be granted. *Keller* v. *Adams Campbell Co.*, 264 U. S. 314, 319; *Layne & B. Corp.* v. *Western Well Works*, 261 U. S. 387, 393; *General Talking Pictures Corp.* v. *Western Electric Co. et al.*, 304 U. S. 175, 179.

II.

With respect to the merits of the petition, the Courts of Appeals for both the Sixth and Seventh Circuits unanimously found that the first patent was anticipated by and wanting in invention over the prior art. The alleged invention consists merely in sewing a brassiere to the top of a corset, with the side flaps of the brassiere sewn to the side of the corset to about the waistline and terminating in elastic straps which cross each other in the back of the corset to be detachably secured thereto. The prior patent to Kops (Vol. II, R. 814) and a prior Princette garment (Vol. II, R. 533, 535), shows the utter want of novelty or invention, as is self evident upon a mere comparison of the claims with the disclosures of those publications, and as both Circuit Courts of Appeals held.

The second patent (which, as above stated, has never been in litigation before) differs from the first merely and solely by making the elastic attachment means for the flap ends of the brassiere portion of the garment of *three* elastics instead of *two* elastics as in the first patent.

III.

The petition is predicated upon an alleged sanctity of Findings of Fact by the Trial Court in accordance with the provisions of Rule 52(a) of the Federal Rules of Civil

Procedure. A sufficient answer to petitioner's entire argument on the subject is that the rule specifically excepts from its mandate findings of the Trial Court which are "clearly erroneous". The Court of Appeals below quite definitely indicated that it found the findings of the District Court to be clearly erroneous.

Moreover, it is self evident that this rule was never intended to have application to the ordinary issues of invention and anticipation in patent litigation, otherwise there would result an unwarranted practice that can be no better illustrated than by the present case. Here, the District Judge, in an oral opinion at the conclusion of the trial, declined to follow the decision of the Court of Appeals for the Sixth Circuit as to the first Cunningham patent, and concluded with the statement (Vol. II, p. 566):

> "The result of what I have said is that plaintiff may prepare and within a short date and on notice present findings of fact and conclusions of law not inconsistent with what I have stated."

As a result, the findings were framed in language of petitioner's own choosing, and were presented to the District Judge who signed them as one might sign a blank check. Thus, as appears from the record (Vol. II, pp. 567 *et seq.*), the District Court is purported to have made *ninety-three separate findings of fact* in a simple patent infringement suit involving most trivial subject matter. And petitioner argues therefrom, in effect, that *none* of these findings may be assailed on an appeal. In effect, the argument resolves itself into the assertion that a defendant in a patent infringement suit is deprived of an appeal even where, as here, a District Judge fails or refuses to follow a superior Court on the same evidence.

Obviously, Rule 52(a) was never intended for any such purpose; and, as worded, permits no such construction.

IV.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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FLOYD H. CREWS,
Counsel for Respondent.